



**University of Nairobi & 2 others v Universities Academic Staff Union (UASU) & 4 others
(Civil Appeal (Application) E771 of 2021) [2022] KECA 3 (KLR) (21 January 2022) (Ruling)**

Neutral citation: [2022] KECA 3 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E771 OF 2021
DK MUSINGA, AK MURGOR & KI LAIBUTA, JJA
JANUARY 21, 2022**

BETWEEN

**UNIVERSITY OF NAIROBI 1ST APPELLANT
UNIVERSITY COUNCIL, UNIVERSITY OF NAIROBI 2ND APPELLANT
STEPHEN G. KIAMA 3RD APPELLANT**

AND

**PUBLIC SERVICE COMMISSION 1ST RESPONDENT
UNIVERSITIES ACADEMIC STAFF UNION (UASU) 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
CABINET SECRETARY MINISTRY OF EDUCATION 4TH RESPONDENT
COMMISSION FOR UNIVERSITY EDUCATION 5TH RESPONDENT**

(An appeal from the Ruling and Orders of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) delivered on 10th December 2021 in E.L.R.C. Petition No. E118 of 2021)

RULING

1. The appellants' application dated 21st December 2021 brought under rule 5(2)(b) of this Court's Rules seeks two main prayers as follows:

“2. THAT this Honourable Court be pleased to issue an order to stay the implementation and/or enforcement of the ruling and order issued by the Employment and Labour Relations Court on 10th December 2021 in ELRC Petition No. E118 of 2021, Universities Academic Staff Union (UASU) -Vs- University of Nairobi & 5 Others requiring the 3rd Appellant to attend the



Employment & Labour Relations Court on 27th January 2022 or any other day thereafter for sentencing pending the hearing and determination of the Appeal herein.

3. THAT pending the hearing and determination of the Appeal herein, this Honourable Court be pleased to stay further proceedings in ELRC Petition No. E118 of 2021, Universities Academic Staff Union (UASU) -Vs- University of Nairobi & 5 Others.”

2. The application is supported by two affidavits sworn by Prof. Stephen G. Kiama (the 3rd appellant), the Vice Chancellor of the University of Nairobi (the 1st appellant), and Eng. Kariuki Muchemi, a member of the University Council, University of Nairobi (U.O.N.), whose contents were highlighted at the hearing by the appellants’ learned Senior Counsel, Mr. Ngatia.

3. The genesis of the application is that on 19th July 2021 the 1st respondent herein filed a petition in the Employment and Labour Relations Court (ELRC) No. E118 of 2021 and sought conservatory orders to restrain the respondents therein from implementing the “Vice Chancellor’s Proposed Governance Reforms dated July 2021 and memo dated 14th July 2021.”

The respondents named in the Motion then were the 1st and the 2nd appellants. The 3rd appellant was then not a party in the suit. The trial court granted *ex parte* orders as sought.

4. On 8th August 2021, the 1st respondent filed a subsequent application alleging that Prof. Kiama together with four other employees of the U.O.N. were in contempt of Court for violating the conservatory orders issued on 21st July 2021.

5. At the inter-partes hearing of the 1st respondent’s application, the 1st and 2nd appellants demonstrated that the alleged “Vice Chancellor’s Proposed Governance Reforms allegedly dated July 2021” was an illusion as no such Reforms were in existence. In its ruling delivered on 18th December 2021, the ELRC found that “the Applicant had not established that there was a document known as 1st Respondent’s “Vice Chancellor’s Proposed Governance Reforms of July 2021”, which was the foundation of the 1st respondent’s application. That notwithstanding, the trial court found the 3rd appellant guilty of contempt of the *ex parte* orders issued on 21st July 2021 and ordered him to appear before it on 27th January 2022 for sentencing.

6. The appellants argue that the 3rd respondent was cited for contempt of court for issuing Guidelines for Examination of Thesis, Dissertations and Project Papers, which they say is a constant in all institutions of higher learning, whereas the order in respect of which the contempt motion was made prohibited

“further implementation” of the alleged “Vice Chancellor’s Proposed Governance Reforms dated July 2021.”

7. The appellants state in their application that their appeal is arguable. On the nugatory aspect, it was submitted that once the sentencing hearing proceeds on 27th January 2022, an order of incarceration of the 3rd appellant will possibly be made, and “deprivation of liberty and whatever goes with it cannot be undone”, as held by this Court in *Philip J. Mainga v Proscovia Vitsengwa & 4 Others* [2020] eKLR.

For those reasons we were urged to grant the orders sought.

8. The 1st respondent through its learned counsel, Mr. Koceyo, opposed the application. Ms. Christine Oyugi learned counsel for the 2nd to 5th respondents told the court that her clients did not participate in the contempt proceedings and, therefore, did not wish to make any submissions on this application.



9. Dr. Constantine Wesonga, the National Secretary General of the 1st respondent stated in her replying affidavit, inter alia, that the appeal is not arguable; that the 3rd appellant is seeking to stop court attendance pursuant to court summons, which is against public policy; that to stay further proceedings of the lower court matter amounts to denial of access to justice to the 1st respondent; that there was no illegality or irregularity committed in the proceedings before the trial court to warrant stay of further proceedings; that the application for contempt arose out of disobedience of a court order and is severable from the substantive petition and proceedings, and should therefore not be stayed; that although the trial court found that there was no document titled “Vice Chancellor’s Proposed Governance Reforms dated July 2021”, it found that there was the Vice Chancellor’s Memo dated 14th July 2021 which contained the impugned restructuring reforms which was being implemented and therefore issued conservatory orders restraining the appellants from proceeding with its implementation.
10. The 1st respondent added that the 3rd appellant was found in contempt of court for issuing Guidelines for Examination of Thesis, Dissertations and Project papers as per his memo dated 14th July 2021, which was in furtherance of the implementation of the memo that had been stayed; that the appeal will not be rendered nugatory by denial of the orders sought as it is based on apprehension and speculation, and that the trial court is yet to pronounce itself on any sentence against the 3rd appellant. On those grounds, among others, we were urged to dismiss the application.
11. The principles that guide this Court in its consideration of rule 5(2)(b) applications are well settled. An applicant must first demonstrate that the appeal or intended appeal is arguable. An arguable appeal is not one that must succeed, it is one that raises grounds that ought to be argued fully. See *Mohamed Bulle v Richard Kipkoech Aiyabei & 7 Others [2021] eKLR*. Secondly, the applicant must also satisfy the Court that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
12. The appellants’ memorandum of appeal raises 15 grounds. They contend, inter alia, that the learned judge erred in law and in fact: in issuing a conservatory order against the implementation of the 1st appellant’s “Vice Chancellor’s Proposed Governance Reforms dated July 2021” notwithstanding the court’s finding of fact that the 1st respondent had “not established” that any such Reforms were in existence; in issuing a conservatory order against the implementation of the memo dated 14th July 2021 oblivious of the fact that the memo was a mere communique of the 1st appellant’s institutional reforms which had already been effected by the 2nd appellant on 9th July 2021; and in holding that the 3rd appellant deliberately disobeyed the orders issued on 21st July 2021.
13. These, among others, are not frivolous grounds; they are arguable, we so find and hold.
14. Turning to the nugatory aspect of the appeal, the 3rd appellant has been summoned to appear before the trial court on 27th January 2022 for sentencing. There is no telling the nature of sentence that the trial court is likely to pass against the 3rd appellant. If it passes a custodial sentence, however short it may be, his personal liberty shall be irreversibly lost.
15. In *Philip J. Mainga v Proscovia Vitsengwa & 4 Others* (supra), this Court, in granting an order staying the sentencing of the applicant pending hearing and determination of an appeal where the applicant had been found guilty of contempt of Court, held that:

“...obviously if a person is sent to jail for even one single day, the deprivation of liberty and whatever goes with it cannot be undone. If stay is not granted in this case and the applicant is sentenced to serve custodial sentence, his appeal were it to succeed will be rendered nugatory.”



We respectfully adopt that same position in this matter.

16. We are satisfied that the appellants’ application satisfies the twin conditions for grant of the orders sought. Consequently, we allow the appellants’ Notice of Motion dated 21st December 2021 and grant prayers 2 and 3 thereon. The costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2022.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

